

OPINION
45-253

December 3, 1945 (OPINION)

SEARCH WARRANTS

RE: Validity

Re: Search Warrants

I received your letter of November 26 relative to the sufficiency of proceedings had in connection with the issuance of search warrants on the twenty-first of November, 1945 by Henry S. Grinde, Justice of the Peace.

You inquire whether a justice of the peace has a right to issue search warrants without the approval of the state's attorney.

Ordinarily the justice of the peace should consult the state's attorney before issuing search warrants. Procedure under search warrants is a serious matter and inadvised use of same may interfere with fundamental private rights. The framers of our Constitution recognized this fact and enacted section 18 of the Constitution of this state, which provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

I believe, however, that the statute does not require the approval of the state's attorney for the issuance of a search warrant, although I believe that the justice of the peace should consult the state's attorney in such matters.

With reference to the search warrants issued by Henry S. Grinde, as justice of the peace, under date of November 21, 1945, copies of which are enclosed with your letter, I beg to advise as follows:

The affidavit of Martin Myhre, leaving out the jurat, is as follows:

"I, Martin Myhre, state deputy game warden, hereby make complaint that I was duly notified that illegal trapping had been committed in the vicinity of SE\ Sec. 12 Twp. 149 Rge. 64, and upon thorough investigation, it is the belief of this affiant that there may be found unlawful possession of wild game, muskrats in the possession of Bob and Charles Borthwick, on their premises located on the above described land, and upon such investigation, the affiant hereby requests a search warrant.

"Dated this 21st day of November, 1945.

(signed) Martin Myhre"

The affidavit with reference to the NE\ Sec. 7-149-64 is worded in practically the same language as above.

Section 29-2903 of the North Dakota Revised Code of 1943 provides that a search warrant can be issued only upon probable cause, supported by affidavit naming or describing the person, and particularly describing the property and the place to be searched.

Section 29-2904 provides that the magistrate, before issuing a search warrant, must examine on oath the complainant and any witnesses he may produce, and must take their affidavits in writing and cause them to be subscribed by the parties making them. The depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

It is the opinion of this office that the affidavits presented are defective and that the allegations therein do not warrant the issuance of search warrants.

The affidavits do not allege any facts which, if true, would authorize the issuance of search warrants. I wish to refer you to the opinion of the Supreme Court of the State of North Dakota in the case of State v. M'Gahey, 12 N.D. 535. On page 541 of the report, the court said:

"The complaint in the action was verified by the affidavit of the state's attorney, to the effect 'that the same is true, to his best knowledge, information and belief.' The affidavit for search warrant was also made by George M. Register, state's attorney, and its averments are all made on information and belief, and none of them are sworn to positively. Upon this hearsay foundation an alleged search warrant was issued by the court, directed and delivered to the sheriff of the county, reciting the papers upon which it was based, and commanding the sheriff at the time of serving the injunction to diligently search the premises described, * * *."

Further, on bottom of page 544 of the same report, the court refers to the statute authorizing the issuance of search warrants and makes the following statement:

"No authority is found in this statute for the issuance of the search warrant unless an affidavit is presented to the court 'stating or showing that intoxicating liquor, particularly describing the same, is kept for sale.' The affidavit presented to the court in this case did not state or show the required facts, but merely asserted that the state's attorney was informed and believed that the facts did exist. The affidavit is uncorroborated. It does not give the name of the person furnishing the information; makes no statement as to where or how the information and believe was obtained, or on what information his belief was founded, or whether it was such information as would inspire belief in the mind of a less credulous person. It is mere hearsay and opinion."

Also, on page 547 we find the following language in the opinion of

the court:

"Neither can such an affidavit, made upon information and belief, furnish the basis for a search and seizure, in the face of the Constitution and statutory safeguards hereinbefore quoted. The affidavit for search warrant did not state or show the facts required by statute to be shown as a foundation for search warrant, and gave no jurisdiction to the court to issue it, and the warrant was therefore void."

In light of the requirements of the statutes quoted, and the decision of the Supreme Court of this state in the case of State vs. M'Gahey, supra, the affidavits upon which the alleged search warrants were issued are fatally defective and the warrants issued thereunder are void.

NELS G. JOHNSON

Attorney General